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No. 86-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LARRY DEAN BOWENS, *et al.*,
Petitioners,

v.

THE BOARD OF LAW EXAMINERS
OF THE
STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bar examination procedure employed by the Board of Law Examiners, which affords a disappointed applicant the right to retake the examination an unlimited number of times, satisfies the requirements of due process.

2. Whether the petitioners' Sherman Act claims are barred by the "state action" exemption to the antitrust laws.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
APPENDIX	1a
Appendix A	
N.C. Gen. Stat. § 84-15 (1985)	1a
N.C. Gen. Stat. § 84-17 (1985)	1a
N.C. Gen. Stat. § 84-21 (1985)	3a
N.C. Gen. Stat. § 84-24 (1985)	5a
N.C. Gen. Stat. § 84-36 (1985)	7a
Appendix B	
Decision of United States Court of Appeals for the Fourth Circuit in *Rogers* v. *Court of Virginia*, No. 84-1746, decided August 22, 1985	8a

TABLE OF AUTHORITIES

Cases	Page
Baker v. *Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954)	6
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977)	8
Bowens v. *Board of Law Examiners*, 57 N.C. App. 78, 291 S.E.2d 170 (1982)	6
California Retail Liquor Dealers Ass'n v. *Midcal Aluminium, Inc.*, 445 U.S. 97 (1980)	8
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	7
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982)	8
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	8
Hannah v. *Larche*, 363 U.S. 420 (1960)	5
Hoover v. *Ronwin*, 466 U.S. 558 (1984)	7-9
In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906)	6
In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981)	6
In re Willis, 288 N.C. 1, 215 S.E.2d 771, *appeal dismissed*, 423 U.S. 976 (1975)	6
Jones v. *Board of Commissioners*, 737 F.2d 996 (11th Cir. 1984)	5
Keenan v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970)	6
Lucero v. *Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984)	5
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978)	8
Parker v. *Brown*, 317 U.S. 341 (1943)	7-9
Poats v. *Givan*, 651 F.2d 495 (7th Cir. 1981)	5

Page

Rogers v. *Supreme Court of Virginia*, No. 84-1746 (4th Cir. Aug. 22, 1985) 5
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 4
Sutton v. *Lionel*, 585 F.2d 400 (9th Cir. 1978) 5
Tyler v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) 4-5
Whitfield v. *Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) 5

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. XIV 1-2,4
15 U.S.C. § 1 3
15 U.S.C. § 2 3
42 U.S.C. § 1981 2
42 U.S.C. § 1983 2
42 U.S.C. § 2000e, *et seq.* 2
N.C. Gen. Stat. § 84-15 (1985) 1,6
N.C. Gen. Stat. § 84-17 (1985) 1,6
N.C. Gen. Stat. § 84-21 (1985) 1,6
N.C. Gen. Stat. § 84-24 (1985) 1,6,8
N.C. Gen. Stat. § 84-36 (1985) 1,6
4th Cir. I.O.P. 36.5 5

Miscellaneous

Special Project, *Admission To The Bar: A Constitutional Analysis*, 34 Vand. L. Rev. 655 (1981) 4

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RESPONDENTS' BRIEF IN OPPOSITION

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The full text of N.C. Gen. Stat. §§84-15, 84-17, 84-21, 84-24, and 84-36 is set forth in the Appendix hereto ("Resp. App.") at la-7a.

STATEMENT OF THE CASE

Petitioners are seven unsuccessful black applicants who have each taken and failed the North Carolina bar examination at least two times. In June 1982, petitioners filed this action against the Board of Law Examiners of the State of North Carolina and its individual members (collectively referred to as the "Board"), alleging that: (1) the administration and grading of the North Carolina bar examination discriminated against petitioners on the basis of their race because both the applications and the examinations were racially segregated; (2) petitioners' examinations were not graded but, rather, were arbitrarily assigned failing grades; (3) petitioners' papers were graded arbitrarily and capriciously; (4) the bar examination itself discriminated on the basis of race; and (5) the lack of a hearing in which to challenge the examination results violates due process.

Petitioners contended that the Board's examination and grading procedure violated 42 U.S.C. § 1981, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, as well as the Due Process Clause of the Fourteenth Amendment.

The trial court subsequently dismissed petitioners' Title VII count in December 1982 for failure to state a claim and the remaining claims for lack of subject matter jurisdiction. While an appeal was pending before the United States Court of Appeals for the Fourth Circuit, petitioners filed petitions with the Supreme Court of North Carolina seeking review of their failures to pass the bar examination. In a letter from its Clerk, that court informed petitioner Diggs that under the Rules Governing Admission to the Practice of Law in North Carolina "[t]here is no right of appeal provided from a board determination that the applicant has failed the examination." Pet. App. 40.

"Expressing no opinion on the outcome," the Fourth Circuit remanded the case for reconsideration in light of

this letter from the Clerk of the Supreme Court of North Carolina. On remand, the District Court retained jurisdiction over petitioners' due process claim but dismissed the statutory claims. Extensive discovery then followed.

On September 10, 1985, petitioners sought leave to amend their Complaint to assert that the Board's actions violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.[1] Respondents subsequently moved for summary judgment on all pending counts. The petitioners then filed a cross-motion for summary judgment on the due process claim only. On January 6, 1986, the District Court denied petitioners' motion to amend their Complaint, denied their cross-motion for summary judgment, and granted the Board's motion for summary judgment on all counts. Pet. App. 19-38. On appeal, the Fourth Circuit affirmed in an unpublished *per curiam* opinion. Pet. App. 17-18.

REASONS FOR DENYING THE WRIT

1. The Review Procedures Authorized By the Board and the Ability to Retake the Bar Examination Satisfy Due Process

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[1]The proposed amendment incorporated by reference the factual allegations of the original complaint. It further alleged that the passing score on the examination was set after all papers were graded, that on eleven of thirteen examinations in the relevant period more black applicants failed the examination than passed it, and that the alleged conduct of the defendants, "which they entered into as a contract and conspiracy in restraint of trade * * * artificially reduc[ed] the number of competing black attorneys in the State of North Carolina; * * * [that] Plaintiffs were among those artificially prevented from entering into competition as attorneys in the State of North Carolina and were thereby further deprived of the right to compete as attorneys for the legal business deriving from or involving the several states of the United States including North Carolina." Although the District Court's opinion does not directly address the issue, its findings on the motion for summary judgment, Pet. App. 22-32, necessarily negate the factual allegations on which the proposed amendment was premised.

Petitioners allege that the Board's failure to provide disappointed bar applicants with any opportunity to review the grading of their exams — either by a Board member or by the Supreme Court of North Carolina — violates the procedural due process requirements of the Fourteenth Amendment. Focusing solely on the failure to provide a hearing, petitioners ignore the other review mechanisms provided by the Board:

> Applicants who fail the examination may come to the offices of the Board to review their own examination papers and to compare their answers to two answers to the same question written by persons who took the examination and who, in the Board's opinion, wrote the best answers. A failed applicant may also bring someone with him to assist in reviewing the examination. A failed applicant is told his [multistate bar examination] MBE score and his total score on the examination. Since June of 1985, failed applicants have also been permitted to have their score on each essay question in the examination.
>
> Failed applicants may also obtain, at their own expense, copies of their examination papers. Applicants are not permitted to obtain copies of the selected correct answers. Applicants may also have, at their own expense, their MBE answer sheets regraded by hand by the testing service. [Pet. App. 32-33; footnote omitted.][2]

Petitioners are certainly entitled to due process, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957), but entitlement to a hearing "does not automatically flow from a finding that procedural due process is applicable." *Tyler* v. *Vickery* 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied.* 426 U.S. 940 (1976).

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[2]In contrast to these post-examination review procedures, several States provide no opportunity for review. Special Project, *Admission To The Bar: A Constitutional Analysis*, 34 Vand. L. Rev. 655, 711-712 (1981).

What process is due depends largely on the "nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960).

Contrary to petitioners' intimation, Pet. at 9, the circuits that have addressed the issue agree that the right to retake a bar examination an unlimited number of times satisfies due process, regardless of whether there is an opportunity for a hearing. *See, e.g., Lucero* v. *Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984); *Tyler* v. *Vickery, supra.*

Other circuits have rejected due process challenges in similar circumstances even where the right to retake the examination was limited. *See, e.g., Jones* v. *Board of Commissioners*, 737 F.2d 996 (11th Cir. 1984) (limited right to review papers of applicant and others and five-time reexamination limit); *Poats* v. *Givan*, 651 F.2d 495 (7th Cir. 1981) (petition to Indiana Supreme Court allowed and four-time reexamination limit); *Sutton* v. *Lionel*, 585 F.2d 400 (9th Cir. 1978) (petition to Nevada Supreme Court and four-time reexamination limit); *Whitfield* v. *Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) (no right to review applicant's examination papers and presumptive five-time examination limit).

In a recent unpublished decision discussed by the District Court and by petitioners, *Rogers* v. *Supreme Court of Virginia*, No. 84-1746 (4th Cir. Aug. 22, 1985) (reprinted at Resp. App. 8a),[3] the Fourth Circuit cited *Tyler* and *Whitfield* with approval in upholding the review procedures employed by the Supreme Court of Virginia. The court expressly stated that due process did not require "an unlimited number of opportunities to

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[3]4th Cir. I.O.P. 36.5 states that the citation of unpublished decisions is disfavored but allows citation where counsel believes that the decision "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well * * *."

retake an examination, or an unlimited number of reviews of failing examinations." Resp. App. at 11a. Thus, there is no divergence among the circuit courts that would militate in favor of granting the writ. The due process issue has been thoroughly discussed by the circuit courts and merits no further illumination from this Court.

2. The Board's Actions Fall Within The State Action Exemption To The Sherman Act. Accordingly, the Motion to Amend was Properly Denied.

In North Carolina, as in most states, "the right to establish the qualifications to be required of one to become a practicing member of the bar" rests with the legislature. *In re Applicants for License,* 143 N.C. 1, 5, 55 S.E. 635 (1906). As the petitioners concede, Pet. at 14, the North Carolina General Assembly, in N.C. Gen. Stat. § 84-24, has delegated its rule-making power in this area to the Board of Law Examiners:

> The statute authorizes the Board of Law Examiners, subject to the approval of the Council of the North Carolina State Bar, to make such rules and regulations for admission to the Bar as in its judgment will promote the welfare of the State and the legal profession. [*In re Willis,* 288 N.C. 1, 8, 215 S.E.2d 771, 775, *appeal dismissed,* 423 U.S. 976 (1975).][4]

"The Board is, therefore, an 'administrative agency,' *Baker* v. *Varser,* 240 N.C. 260, 82 S.E.2d 90 (1954), with both judicial and delegated legislative powers." *Keenan* v. *Board of Law Examiners,* 317 F.Supp. 1350, 1355 n.5 (E.D.N.C. 1970). As this delegation of authority makes clear, *see* N.C. Gen. Stat. §§ 84-15, 84-17, 84-21, 84-24, and 84-36, the North Carolina Supreme Court retains

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[4]*See also In re Moore,* 301 N.C. 634, 639, 272 S.E.2d 826, 829 (1981); *Bowens* v. *Board of Law Examiners,* 57 N.C. App. 78, 81, 291 S.E.2d 170, 172 (1982), a case brought by several of the petitioners but abandoned after an adverse ruling by the intermediate state appellate court.

ultimate authority over the rules and procedures proposed by the Board. Thus, because the Board's procedures are adopted pursuant to a "clearly articulated" state policy and are "actively supervised" by the North Carolina Supreme Court, its actions are exempt under the state action doctrine. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

Petitioners wholly fail to discuss this Court's decision in *Hoover* v. *Ronwin*, 466 U.S. 558 (1984). In *Hoover*, the Court ruled that the state action doctrine applies to the grading of bar examinations by the Arizona Supreme Court's Committee on Examinations and Admissions. Under the Arizona constitution, the Arizona Supreme Court has the authority to determine who should be admitted to practice law in the state. Pursuant to that authority, the court established the committee to examine applications for admissions to the Arizona bar but retained the authority to admit or deny admission. *Hoover*, 466 U.S. at 561. Ronwin, a disappointed applicant, challenged that the Arizona committee denied him due process and equal protection and violated the Sherman Act by "artificially reducing the numbers of competing attorneys in the State of Arizona." *Id.* at 565. After examining the delegation of power from the Arizona Supreme Court to the committee, this Court ruled that the committee's actions were exempt under the state action doctrine. The starting point for the *Hoover* Court, as is the case here, is the reasoning of *Parker* v. *Brown*, 317 U.S. 341 (1943). Basing its decision on principles of federalism and state sovereignty, the *Parker* Court refused to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of

> government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not likely to be attributed to Congress. [*Parker*, 317 U.S. at 350-351.]

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 360 (1977), the Court held that a state's supreme court, when acting in a legislative as opposed to judicial capacity, occupies the same position as that of a state legislature and thus its decisions in that capacity are exempt from Sherman Act liability as state action. *See also Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975). The Court has also interpreted *Parker* to apply to state administrative agencies where it is clear that the anticompetitive conduct of that agency was contemplated by the state. *See, e.g., Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (private price-fixing arrangement authorized by State); *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board).

In the present case, it is clear that the challenged conduct is expressly *required* by N.C. Gen. Stat. § 84-24:

> The Board of Law Examiners * * * *shall* by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession * * *. [Emphasis added.]

This case is clearly distinguishable from *Goldfarb*, which involved procedures neither required nor approved by the state supreme court or state legislature.

Instead, the logic of *Hoover* and *Bates* is directly applicable here. The individual respondents here are members of a legislatively created body to which, as petitioners

concede, the North Carolina General Assembly has delegated its authority to establish qualifications for admission to the Bar. As had the Arizona Supreme Court in *Hoover*, the North Carolina Supreme Court retains approval powers over the Board's rules. Thus, although the North Carolina General Assembly has delegated its rule-making authority to the Board, the Board's actions are still subject to the ultimate approval of the North Carolina Supreme Court. Pursuant to the logic of *Hoover* and *Bates*, therefore, the conduct challenged by the petitioners is in reality the combined conduct of the North Carolina General Assembly and Supreme Court. The Board's actions are, accordingly, exempt from Sherman Act liability under the state action doctrine of *Parker* v. *Brown*. Moreover, the District Court expressly found that the Board did not engage in the conduct that the petitioners challenged as anticompetitive. Pet. App. 22-32.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

N.C. GEN. STAT. § 84-15 (1985):

Creation of North Carolina State Bar as an agency of the State.

There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

N.C. GEN. STAT. § 84-17 (1985):

Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be

competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district. A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the council until expiration of the remainder of the current term.

In addition to the 50 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1,2; 1981, c. 788, s. 3; 1985, ç. 60, s. 1.)

N.C. GEN. STAT. § 84-21 (1985):

Organization of council; publication of rules, regulations and bylaws.

Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within 120 days after this Article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the City of Raleigh not less than 20 days nor more than 30 days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this Article. The regular term of all officers shall be one year, but those first elected shall serve until January 1, 1935. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this Article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this Article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of

this Article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this Article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this Article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within 30 days, then, after the lapse of 30 days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinbefore required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this Article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this Article, may be amended by the council from time to time in any manner not inconsistent with this Article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its

minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article. (1933, c. 210, s. 7.)

N.C. GEN. STAT. § 84-24 (1985):

Admission to practice.

The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this Article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The Board of Law Examiners shall elect a member of said Board as chairman thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable said Board to perform its duties promptly and properly. The chairman and any employees shall serve for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Board of Law Examiners, subject to the approval of the council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a

written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177.)

N.C. GEN. STAT. § 84-36 (1985):

Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

APPENDIX B

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 84-1746

EDYTHE MAE ROGERS,

Appellant,

versus

SUPREME COURT OF VIRGINIA;
VIRGINIA BOARD OF BAR EXAMINERS;

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge. (C/A No. 84-0027)

Submitted: November 2, 1984 Decided: August 22, 1985

Before MURNAGHAN, SPROUSE and WILKINSON, Circuit Judges.

(Edythe Mae Rogers, Appellant Pro Se. Gerald L. Baliles, James T. Moore, III, and Neil A. G. McPhie for Appellees.)

Per Curiam:

Edythe Mae Rogers, pro se, appeals the district court's dismissal of her suit filed pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, and 15 U.S.C. §§ 1 and 15. For the reasons given below, we affirm the judgment.

Rogers sat for the Virginia Bar Examination in February 1980, July 1980, July 1982, and February 1983. After each of these examinations she was informed that she had not passed. After receiving the results of the July 1980 and July 1982 examinations, she sought and obtained a review of the essay portions of her exams. On both occasions, the review consisted of an interview with one of the bar examiners, during which she and the examiner discussed her individual examination.

After the February 1983 examination, the Virginia Board of Bar Examiners sent a form letter to all unsuccessful examinees, indicating that a review of the essay portion of the exam would be available only to those who had failed the essay portion on two or more occasions and had not previously had reviews of their examinations. Rogers, according to the terms of this letter, was not entitled to a review of her February 1983 examination. Rogers then petitioned the Supreme Court of Virginia to review the Board's adverse determination as to her February 1983 examination. The Supreme Court of Virginia declined to do so.

Rogers complains that the Board's review procedure is constitutionally inadequate. She also contends that the Virginia Supreme Court acted unconstitutionally when it refused to review the adverse determination of the Board. In addition, she claims that the state's bar examination and review process violates the antitrust laws. The district court, after finding that it had jurisdiction over the matter, dismissed the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

We think that the district court correctly decided that it had jurisdiction, on the ground that Rogers was challenging the conduct of a non-judicial proceeding. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

As to the merits of the case, we disagree with parts of the district court's reasoning; however, because we think that the district court could have dismissed the complaint for other reasons, we will affirm its judgment.

The district court reasoned that, since there is no absolute right to an appeal under the United States Constitution, *Ross v. Moffitt*, 417 U.S. 600, 606 (1974), and because all appeals before the Supreme Court of Virginia are discretionary, *McCue v. Commonwealth*, 103 Va. 870, 49 S.E.2d 623 (1905), the Virginia Supreme Court was entitled to refuse to hear Rogers' petition. We do not agree with the district court's characterization of Rogers' petition as an appeal. Because the Virginia Supreme Court has the ultimate responsibility for determining admission to the Virginia bar, *Woodard v. Virginia Board of Bar Examiners*, 454 F. Supp. 4 (E.D. Va.), *aff'd*, 598 F.2d 1345 (4th Cir. 1979), we think that, when that court reviews or declines to review a decision of the bar examiners as to an individual examinee's status, the court is acting as an administrative agency, rather than as a court of appeals. Therefore, we find it appropriate to determine whether or not Rogers' allegations concerning the review procedures of the court and the Board make out a viable claim.

A state may not deny a person a license to practice law in a manner that contravenes either the due process clause or the equal protection clause, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238–39 (1957). We do not think that Rogers' complaint alleges a violation of either of these constitutional provisions; therefore, we believe that Rogers has failed to state a claim under 42 U.S.C. § 1983.

In regard to the due process issue, this Court has not formulated precise guidelines for what process is due to disappointed bar examinees. However, our review of the law on this subject convinces us that the review procedure provided by the Virginia Board of Bar Examiners satisfies the requirements of due process. It is generally held that the opportunity for reexamination provides an adequate means of exposing grading errors. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974). Also, it has been decided that due process does not require that a hearing be granted to a bar examinee for the purpose of contesting the results of an examination, *Tyler v. Vickery*, *supra*, or that an applicant be permitted to see his examination papers and compare them with model answers, *Whitfield v. Illinois*, *supra*. One circuit has concluded that the lack of an established procedure for review of examinations by the state supreme court does not render the state bar entrance rules unconstitutional. *Feldman v. State Board of Bar Examiners*, 438 F.2d 699 (8th Cir. 1971).

In view of these precedents, and guided by the principle that the content of due process varies with each factual context, *Hannah v. Larche*, 363 U.S. 420 (1960), we conclude that Virginia's bar examination review procedures are adequate under the due process clause. At the time of Rogers' complaint, the Virginia Board of Bar Examiners permitted an examinee to take the bar examination five times and to obtain a review of failing examinations twice. We do not think that due process requires that a state bar examining agency provide an unlimited number of opportunities to retake an examination, or an unlimited number of reviews of failing examinations. We do not think that an examinee has an absolute right to have a failing examination reviewed by the state supreme court. Therefore, we believe that Rogers has not stated a claim of a due process violation.

Rogers has failed to state an equal protection claim, because she has not alleged with specificity that she, a black female, has been treated differently from persons who are not black or female.

Rogers' claim under 42 U.S.C. § 1981 is not viable because she has not alleged differential treatment on account of her race.

Rogers' claim under 42 U.S.C. § 1985 fails because she has not alleged facts to indicate that the defendants conspired to deprive her of the equal protection of the laws or equal privileges and immunities under the laws. *Griffin v. Breckinridge*, 403 U.S. 88, 102-03 (1971).

Rogers has not stated a claim under 15 U.S.C. §§ 1 and 15 because any action by the defendants in this case falls within the state action exemption to the antitrust laws. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

For the foregoing reasons, we affirm the district court's judgment. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED.